IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-634

LARRY OWEN MANNING,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Larry Owen Manning, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered and filed on October 8, 1976, affirming the Petitioner's conviction in the United States District Court for the Western District of Tennessee.

OPINIONS BELOW

The unpublished order of the District Court overruling the Petitioner's motion for new trial appears in Appendix A, p. A-1. The unpublished Memorandum Opinion of the Court of Appeals for the Sixth Circuit in *United States of America, Plaintiff-Appellee v. Larry Owen Manning, Defendant-Appellant*, No. 76-1015, appears in Appendix B, p. A-5.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on October 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb: nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTION PRESENTED

Whether the Petitioner was denied due process of law when, during a recess taken in the middle of the Petitioner's testimony at trial, one juror expressed to another juror her opinion that the Petitioner had perjured himself during the course of his testimony?

STATEMENT OF THE CASE

On September 12, 1972, the Petitioner was indicted (Appendix C, p. A-7) in the Western District of Tennessee on one count of wire fraud under 18 U.S.C. § 1343 by reason of his use of a type of signal frequency generator, commonly known as a "blue box", to circumvent the long distance billing equipment of South Central Bell Telephone Company.

Following arraignment, the Petitioner was tried before a jury, and a mistrial resulted when the jurors could not reach a unanimous verdict.

In April of 1974 the Petitioner was tried for the second time. This time the jury was able to reach a unanimous verdict of guilty on May 3, 1974.

At the close of the trial, following the announcement by the jury of its verdict of guilty, the Petitioner's attorney made oral application for an order authorizing him to interview the jurors for the purpose of determining if any of the jurors had engaged in any discussion of the case prior to the submission of the issues to the jury for its deliberation. On May 9, 1974, the District Judge entered an "Order Authorizing Post-Verdict Interrogation of Jurors" (Appendix D, p. A-9).

On June 7, 1974, the Petitioner filed a motion for new trial asserting, *inter alia*, that the Petitioner was denied his right to

due process of law when, during a recess taken in the middle of the Petitioner's testimony at trial, one juror expressed to a fellow juror her opinion that the Petitioner had given perjured testimony (Appendix E, p. A-11). Filed along with the motion for new trial was a legal memorandum submitted in support of the motion (Appendix F, p. A-13). Additionally, the Petitioner filed at the same time the affidavit of Mrs. William Paul Warren (Appendix G, p. A-21), the juror to whom the aforesaid remark was made.

On June 25, 1974, the government filed a legal memorandum in response to the Petitioner's motion for a new trial (Appendix H, p. A-23). Two days later on June 27, 1974, the Petitioner filed a second legal memorandum in support of his motion for new trial (Appendix I, p. A-35).

Following a hearing, the District Court overruled the Petitioner's motion for a new trial in an order entered on April 11, 1975 (Appendix A, p. A-1). Though an evidentiary hearing was held on other issues raised by the Petitioner's motion for new trial, an evidentiary hearing was unnecessary on the issue raised in this Petition, as it was stipulated by both the government and the Petitioner that the contents of Mrs. Warren's affidavit (Appendix G, p. A-21), the accuracy of which was not contested by either side, would comprise all of the evidence presented on this issue. The District Court's order overruling the Petitioner's motion for new trial, though it contained extensive findings and discussion of the other issues[1] raised in the Petitioner's motion for new trial, said nothing about the issue raised in this Petition, except for the following general remark:

> "11. That the defendant was not prejudiced in any way by any aspect of the conduct of the jury or any member thereof." (Appendix A, pp. A-1, A-3)

[1] The other issues raised in the Petitioner's motion for new trial centered on factual allegations contained in the affidavit of another juror, Myrtle Lemmon. Those issues are not raised in this Petition.

On appeal the Petitioner raised, along with three additional issues, the issue presented in this Petition. In affirming the judgment of the District Court, the Court of Appeals did not discuss the issue presented in this Petition, except to say that "defendant-appellant's arguments are without merit" (Appendix B, pp. A-5, A-6)

REASONS FOR GRANTING THE WRIT

The Petitioner Was Denied Due Process of Law When, During a Recess in His Testimony at Trial, One Juror Expressed to a Fellow Juror Her Opinion That the Petitioner Had Perjured Himself.

Pre-deliberation remarks or discussion by or among jurors and the effect of such on the right of an accused to a fair trial is a subject which, to this Petitioner's knowledge, this Court has not specifically addressed. To the limited extent that the lower federal courts have dealt with this subject, there has been, as will hereafter be shown, a conflict of opinion. The remainder of this Petition discusses why this Court should, in this case, grant this Petition and issue a pronouncement on this very important subject.

On May 9, 1974, the District Court entered an order authorizing the attorneys for both parties to make inquiries of any or all of the jurors "concerning the topic of whether or not the issues in this case were discussed by all or some of the members of the jury prior to the submission of the case to the jury following the Court's final instructions" (Appendix D, p. A-9). Pursuant to this order, counsel for the Petitioner did make the authorized inquiries and discovered that one of the jurors did, in fact, make a highly prejudicial comment about the case to another juror substantially prior to the District Court's final submission of the case to the jury.

As set forth in the affidavit of Mr. William Paul Warren (Appendix G, p. A-23), another juror, Mrs. Mary Brooks Brown, remarked to Mrs. Warren, while she and Mrs. Warren were walking out of the courtroom during a recess which occurred in the middle of the Petitioner's testimony, that she believed that the Petitioner, during that portion of his testimony which had just theretofore been completed, had failed to tell the truth on

two occasions. Mrs. Warren stated in her affidavit that at the time in question she agreed with Mrs. Brown that the defendant had failed to tell the truth and that she made no response to Mrs. Brown's comment. It was undisputed that Mrs. Brown's action was in direct violation of the District Court's instruction to the jurors that they not comment on the case to anyone, including other members of the jury, until such time as they were authorized by the District Court to begin their deliberations.

The District Court, though it did not express its reasoning in a written opinion or order, apparently felt, in view of the fact that at the time in question Mrs. Warren agreed with Mrs. Brown that the Petitioner had not been truthful in his testimony, that the Petitioner had not been prejudiced by Mrs. Brown's improper conduct. The Court of Appeals, though it did not discuss this issue in its opinion (Appendix B, p. A-5), apparently agreed with the District Court's conclusion.

As previously noted, the facts giving rise to this issue are undisputed. The only dispute is over the District Court's finding that the Petitioner was not prejudiced by Mrs. Brown's misconduct.

For reasons which will hereafter be shown, the Petitioner was indeed prejudiced by Mrs. Brown's misconduct. Accordingly, the finding of the District Court should be set aside as being clearly erroneous, and the opinion of the Court of Appeals should be reversed.

Mrs. Brown's misconduct was seriously prejudicial to the Petitioner's right to a fair trial in two important respects. First, Mrs. Brown, by verbally conveying her unfavorable impression of the defendant to another juror, committed herself prematurely on the important question of the defendant's credibility, thereby placing herself in a position where it would be difficult and embarrassing to change her mind later when final deliberations were conducted. *Winebrenner v. United States*, 147

F.2d 322 (8th Cir. 1945) (hereafter immediately discussed at length). Second, Mrs. Brown's comment served to reinforce the views which Mrs. Warren was already formulating at that stage of the trial. That is to say, Mrs. Warren, upon hearing Mrs. Brown's remark, was put on notice that another juror shared her opinion on the crucial question of the defendant's credibility. In light of the foregoing misconduct on the part of Mrs. Brown and the serious prejudicial effects emanating therefrom, it must be concluded that the defendant did not receive a trial by a fair and impartial jury.

There can be no doubt that jurors are not entitled to discuss their case among themselves prior to the trial court's submission of the case to the jury for final deliberations. This principle was established clearly in *Winebrenner v. United States*, *supra*, which held it is reversible error for a trial judge to instruct the jurors that they may discuss the case among themselves during the course of the trial as long as they keep an open mind on the issues being tried.

Winebrenner involved a prosecution for conspiring to use improper influence to obtain government contracts for a company in which the defendant had an interest. Because the opinion in *Winebrenner* constitutes an excellent discussion of the dangers stemming from pre-deliberation remarks by the jurors, it is beneficial to our analysis to look at the opinion with some degree of scrutiny.

In reaching its decision in *Winebrenner*, the Court relied primarily on the fundamental proposition that the jury's open minded consideration of all the evidence can be assured only by prohibiting the jurors from commenting on any evidence until such time as (1) all the evidence has been presented, (2) the attorneys for both sides have been afforded the opportunity to present their final arguments, and (3) the trial court has given the jury its final instructions. Thus the Court stated:

> "If, however, the jurors may discuss the case among themselves, either in groups of less than the entire jury, or with the entire jury, they are giving premature consideration to the evidence. By due process of law is meant 'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel."
>
> 147 F.2d 328.

The Court in *Winebrenner* also emphasized the fact that a juror who, prior to the authorized time for deliberation, expresses an opinion about the case is likely to consider any remaining evidence and the closing arguments with a view toward strengthening his previously formed opinion. The Court reasoned as follows:

> "A juror having in discussion not only formed but expressed his view as to the guilt or innocence of the defendant, his inclination thereafter would be to give special attention to such testimony as to his mind strengthened, confirmed or vindicated the views which he had already expressed to his fellow jurors, whereas, had there been no discussion and no expression of tentative opinion, he would not be confronted with embarrassment before his fellow jurors should he change the tentative opinion which he might entertain from hearing evidence."
>
> 147 F.2d 328.

Applying this reasoning to the instant case, it must be inferred that Mrs. Brown, once she had remarked to her fellow juror that she believed that the defendant had lied on two oc-

casions, was at that time no longer capable of giving fair and impartial consideration to the Petitioner's side of the case.

It is very important to note that in *Winebrenner* the Court was concerned with the *potential* for prejudice inherent in allowing members of the jury to comment on the case prior to the time they were to begin their deliberations. In short, the Court was fearful that such pre-deliberation discussion would undermine the impartiality and fairness to which the defendant had an absolute constitutional right. In the instant case, we can see that the *Winebrenner* Court's fears, so eloquently described in that opinion, were actually realized.

The Petitioner readily admits that at least one Circuit has taken a position contrary to that set forth in *Winebrenner*. In *United States v. Klee*, 494 F.2d 394 (5th Cir. 1974), *cert. denied* 419 U.S. 835 (1974), the Court of Appeals for the Fifth Circuit refused to set aside the District Court's finding that the defendant was not prejudiced when eleven jurors, in violation of the District Court's order, discussed the case during a recess, with nine of these jurors expressing premature opinions about the defendant's guilt. It is respectfully submitted that the ruling in *Klee*, insofar as it sanctions pre-deliberation comments by jurors on the issues which they will subsequently be deciding, is totally inconsistent with the very basic tenet that every defendant in a criminal trial is entitled to a trial by fair and impartial jurors who will not seek to influence or derive influence from their fellow jurors prior to the trial court's submission of the case to the jury for final deliberation.

The courts below, recognizing the natural frailties of jurors as human beings, have, by their failure to so much as write one word on the specific issue presented in this Petition, indicated that they do not view the jury misconduct which occurred in this case with much concern. However, in view of the concern which this Court and lower courts have shown when presented with other forms of jury misconduct (for example, the use of intoxi-

cants while in deliberation, the reading of newspapers during deliberations and communications with court officials or other third persons during course of the trial), the lack of concern evidenced by the lower courts for the misconduct involved in the instant case appears, at the very least, unsound. It is difficult to see how the Petitioner was any less adversely affected than those who were tried by jurors who were guilty of the previously mentioned forms of misconduct. Believing that he was being judged by twelve people who would wait until after all of the proof was presented, the closing arguments of his counsel were made and the District Court's instructions were read before commenting to one another on the issues, the Petitioner learned instead that one of the jurors had prematurely commented on the crucial issue of his credibility to a fellow juror. The Petitioner earnestly asks this Court to grant this Petition and subsequently render an opinion demonstrating unequivocally that this type of conduct is not to be tolerated.

CONCLUSION

For the reasons stated herein, the Petitioner respectfully prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted this 5th day of November, 1976.

LUCIUS E. BURCH, JR.

J. BROOKE LATHRAM
BURCH, PORTER & JOHNSON
130 North Court
Memphis, Tennessee 38103
Attorneys for Petitioner

Certificate of Service

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed, with first class postage prepaid, to Robert H. Bork, Solicitor General, Department of Justice, Tenth and Pennsylvania Avenue, Northwest, Washington, D.C. 20530 and one copy to Larry E. Parrish, Assistant United States Attorney, 10th Floor, Federal Building, Memphis, Tennessee 38103.

J. BROOKE LATHRAM
BURCH, PORTER & JOHNSON
130 North Court
Memphis, Tennessee 38103

APPENDIX

APPENDIX A

In the United States District Court
For the Western District of Tennessee
Western Division

United States of America
v.
Larry Owen Manning
} Cr. No. 72-173

ORDER ON MOTION FOR NEW TRIAL

(Filed April 11, 1975)

On April 1, 1975, the court entered an Order On Amended Motion For New Trial, said Order filed on April 2, 1975, in which it disposed of all issues presented in connection with the defendant's request for a new trial except those raised by the original Motion For New Trial filed June 7, 1974. On April 4, 1975, the court conducted a hearing in open court in which testimony was received from four (4) witnesses (all members of the petit jury which convicted the defendant) and heard further arguments of counsel. The defendant and the United States were given full opportunity to adduce whatever proof they felt appropriate in furtherance of their positions. Based on proof elicited at the open court evidentiary hearing conducted on April 4, 1975, this court makes the following findings of fact:

1. That the allegations of the defendant concerning improprieties relating to the jury are based primarily on the testimony of juror Lemon;

2. That juror Lemon is not a credible witness concerning the matters which she testified to at the evidentiary hearing conducted on April 4, 1975;

3. That there was no harassment of juror Lemon from other jurors or any other persons;

4. That juror Lemon was not influenced by any inappropriate influences from other jurors or any other persons in reaching her conclusion that the defendant was guilty of the charges alleged against him in the indictment;

5. That the foreman of the jury specifically instructed juror Lemon, before reporting the jury's verdict, that she could not merely go along with the conclusion of other jurors but that she must independently reach her own conclusion based on the dictates of her own conscience;

6. That there was no pressure from the court on juror Lemon when she, along with all of the other jurors, was individually polled as to whether or not the verdict reported by the foreman of the jury was her individual verdict;

7. That juror Lemon is a suspicious person who seeks to infer totally unwarranted conclusions and base accusations concerning her fellow jurors on her unfounded suspicions;

8. That juror Lemon was not persuaded or influenced by any matters extraneous to the trial proceedings and evidence adduced but did herself seek to influence her fellow jurors by reliance on matters extraneous to the trial proceedings including the experience of her husband;

9. Any references made by jurors in the course of their deliberations to the possible sentence which would be imposed on the defendant had no effect whatever in the jury's ultimate conclusion of guilt;

10. That any reference made by jurors during the course of their deliberation that a lot of money had been spent in the investigation and prosecution of the case against the defendant had no effect whatever on the conclusion that the jury reached that the defendant was guilty of the charges pending against him;

11. That the defendant was not prejudiced in any way by any aspect of the conduct of the jury or any member thereof;

12. That the closing argument of the Assistant United States Attorney referencing the fact that some persons prone toward fraud conduct themselves inconsistently according to the circumstances and underlying motives at the time was not harmful or prejudicial to the defendant so as to deny him a fair trial;

13. That the closing argument of the Assistant United States Attorney referencing the material possessions of the defendant was proper in that the defendant injected this issue into the proceedings by proof elicited by him;

14. That the proof of defendant's guilt at trial was overwhelming.

Based on the above findings of fact, the court is of the opinion that the Motion For New Trial should be overruled. Therefore, it is

Ordered that the Motion For New Trial shall be and the same hereby is overruled and dismissed. It is

Further Ordered that the defendant shall appear for sentencing in this court at 2:30 p.m., April 11, 1975.

Enter: This — day of April 1975.

(Illegible)
United States District Judge

Approved:

THOMAS F. TURLEY, JR.
United States Attorney

By /s/ LARRY E. PARRISH
Assistant United States Attorney

APPENDIX B

No. 76-1015

United States Court of Appeals
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Larry Owen Manning,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed October 8, 1976

Before: Phillips, Chief Judge, Peck, Circuit Judge and McAllister, Senior Circuit Judge.

Per Curiam. This is an appeal from a jury conviction for wire fraud in violation of 18 U.S.C. § 1343. Defendant-appellant used a type of signal frequency generator, commonly known as a "blue box," to circumvent the long distance billing equipment of South Central Bell Telephone Company, enabling him to make unlimited long distance calls without charge.

Defendant's first trial resulted in a mistrial, when jurors could not reach a unanimous verdict. Prior to the second trial, he filed a motion to suppress evidence obtained as a result of the electronic surveillance on his home telephone, which recorded the times of calls made, the numbers dialed and the fact that a "blue box" had been used. Only so much of a conversation was recorded as was required to verify that a call had been com-

pleted. After an evidentiary hearing, the district judge overruled the motion to suppress. The second trial resulted in a guilty verdict and defendant was sentenced to two years imprisonment, and this appeal followed.

Appellant contends that the actions of the telephone company in tapping his telephone violated the Fourth and Fourteenth Amendments and the Omnibus Crime Control Act, 18 U.S.C. §§ 2510-20, and therefore that the evidence obtained should have been suppressed by the district court. The district court, in its ruling from the bench, held that:

> ". . . the proof conclusively shows that there was no involvement by any federal law enforcement officer . . . that relates to the independent investigation of the defendant Manning's telephone by means of the device that was employed, that would even come close to making this a Fourth Amendment violation."

We hold the district court was correct in its conclusion that South Central Bell Telephone Company was not acting as an instrument or agent of the federal government, *United States v. Clegg*, 509 F.2d 605 (5th Cir. 1975), and that defendant's motion to suppress was properly denied.

As to defendant-appellant's other contentions regarding alleged misconduct by jury members, we note that the district judge thoroughly reviewed the evidence presented on this matter, and we agree with the district court's conclusion that defendant-appellant's arguments are without merit.

The judgment of the district court is affirmed.

APPENDIX C

In the United States District Court for the Western District of Tennessee, Western Division

United States of America v. Larry Owen Manning, and Bill Clegg	Cr. No. 72-173 18 USC, §1343 18 USC §2

INDICTMENT

(Filed September 12, 1972)

The Grand Jury Charges:

Count One

From on or about the 21st day of August 1972 and continuing thereafter up to and including the 11th day of September 1972 in the Western District of Tennessee, Western Division, and various other places in the United States, Larry Owen Manning and Bill Clegg, hereinafter referred to as defendants, devised and intended to devise, and aided, abetted, counseled and commanded each other in devising and intending to devise, a scheme and artifice to defraud South Central Bell Telephone Company and American Telephone and Telegraph Company, which said scheme and artifice was in substance as follows, to wit:

(1) As an integral part of said scheme and artifice, defendants utilized and intended to utilize a signal frequency generator in order to duplicate certain signaling frequencies used by South Central Bell Telephone Company and American Telephone and Telegraph Company in the control of the interstate long distance switching network and in the maintenance of records of the existence of such calls for purposes of billing.

(2) As a further integral part of said scheme and artifice, defendants did and intended to circumvent the normal methods used by South Central Bell Telephone Company and American Telephone and Telegraph Company to record the existence, origin and destination of long distance telephone calls for the purposes of remuneration to South Central Bell Telephone Company and American Telephone and Telegraph Company for the use of their equipment and facilities in the placing of said long distance calls.

(3) As a further integral part of said scheme and artifice, defendants intended to distribute said signaling frequency generator to other potential users of said device for the purpose of realizing a profit from the commercialization of said device.

On the 11th day of September 1972 at 11:13 a.m., in the Western District of Tennessee, Western Division, at Memphis, Tennessee in furtherance of and for the purpose of executing the aforesaid scheme, Larry Owen Manning and Bill Clegg knowingly did transmit and cause to be transmitted, and aided, abetted, counseled and commanded each other in the transmission and causing to be transmitted, by means of wire signals and sounds using equipment and facilities of South Central Bell Telephone Company and American Telephone and Telegraph Company, in violation of Title 18, United States Code, §1343 and Title 18, United States Code, §2.

(nm $1,000., or nm 5 yrs., or both)

A True Bill

.....

Foreman

Dated: September 12, 1972

.....

United States Attorney

APPENDIX D

In the United States District Court
For the Western District of Tennessee
Western Division

United States of America, Plaintiff.	vs.	No. CR. 72-173
Larry Owen Manning, Defendant.		

ORDER AUTHORIZING POST-VERDICT INTERROGATION OF JURORS

(Filed May 9, 1974)

An oral application having been made by counsel to be permitted to interrogate the jurors who returned a verdict in this cause on May 3, 1974, and it appearing to the Court that a post-interrogation of the jurors is appropriate to the extent that the jurors are willing;

It Is, Therefore, Ordered that the attorney for the Government and the attorneys for the defendant may interrogate the jurors who are willing to discuss the matter with the attorneys and in accordance with the terms of this order, provided that all such interrogations must terminate by 10:00 P.M. on Friday, May 31, 1974. Inquiries may be made of any or all of the jurors by the attorneys for the parties telephonically, in person, or in writing concerning the topic of whether or not the issues in the case were discussed by all or some of the members of the jury prior to the submission of the case to the jury following

the Court's final instructions. Any juror who is unwilling to be interrogated by the attorneys may state his unwillingness in the same manner in which the interrogation is sought. Thereafter, if counsel is of the opinion that further interrogation is required, a further application will be made to the Court.

Entered this 9th day of May, 1974.

/s/ ROBERT M. McRAY, JR.
United States District Judge

APPENDIX E

In the United States District Court
For the Western District of Tennessee
Western Division

United States of Amercia vs. Larry Owen Manning	No. CR-72-173

MOTION FOR NEW TRIAL

(Filed June 7, 1974)

The defendant, Larry Owen Manning, by and through his undersigned attorneys, moves for a new trial on the grounds that his constitutional right to a fair trial was impaired by juror misconduct which is set forth in the accompanying affidavit of Mrs. William Paul Warren and discussed fully in the defendant's accompanying memorandum in support of this motion. The defendant further moves for a new trial on the grounds that his right to a fair trial was seriously prejudiced by the introduction of evidence pertaining to the size of the defendant's home and his financial status and by the United States Attorney's subsequent inflammatory closing argument based thereon.

s/ LUCIUS E. BURCH, JR.
s/ J. BROOKE LATHRAM
Attorneys for Defendant

Certificate of Service

I hereby certify that a copy of the foregoing has been sent to Larry Parrish, Federal Building, Memphis, Tennessee, this 7th day of June, 1974.

/s/ J. BROOKE LATHRAM

APPENDIX F

In the United States District Court for the
Western District of Tennessee
Western Division

United States of America
vs.
Larry Owen Manning
} No. CR-72-173

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL

(Filed June 7, 1974)

The defendant moves for a new trial on two grounds. First, juror misconduct, which is specifically discussed herein below, prejudiced his right to a fair trial. Second, the defendant's right to a fair trial was seriously prejudiced by the introduction of totally irrelevant evidence pertaining to the size of his home and his financial status and by the United States Attorney's subsequent closing argument based on the aforesaid irrelevant evidence. Each of these grounds will be discussed in Parts I and II of this Memorandum.

I

On May 9, 1974, the Court entered an order authorizing the attorneys for both parties to make inquiries of any or all of the jurors "concerning the topic of whether or not the issues in the case were discussed by all or some of the members of the jury prior to the submission of the case to the jury following the Court's final instructions." Pursuant to this order, counsel

for the defendant did make the authorized inquiries and discovered that one of the jurors did, in fact, make a highly prejudicial comment about the case to another juror prior to the Court's final submission of the case to the jury. As set forth in the accompanying affidavit of Mrs. William Paul Warren, one of the jurors, Mrs. Mary Brooks Brown, remarked to Mrs. Warren, while she and Mrs. Warren were walking out of the courtroom during a recess which occurred in the middle of the defendant's testimony, that she believed that the defendant, during that portion of his testimony which had just theretofore been completed, had failed to tell the truth on two occasions. Mrs. Warren, who now states in her affidavit that at the time in question she agreed with Mrs. Brown that the defendant had failed to tell the truth on two occasions, made no response to Mrs. Brown's comment. Mrs. Brown's comment was, of course, highly improper and in direct violation of the Court's instruction to the jurors that they not discuss the case with anyone, including other members of the jury, until such time as they were authorized by the Court to begin their deliberations.

It is, of course, well settled in this Circuit that where there is disclosed evidence of juror misconduct there is a strong presumption that the defendant's right to a fair trial was prejudiced. *United States v. Ferguson*, 486 F.2d 968 (6th Cir. 1973). In the instant case it is clear that the Government cannot overcome this strong presumption of prejudice.

There can be no doubt that Mrs. Brown's comment seriously prejudiced the defendant's right to a fair trial. Mrs. Brown's remark about the credibility of the defendant shows that there existed at the time of her comment a clear predisposition on her part to judge the defendant unfavorably. What is much worse, she conveyed her unfavorable impression of the defendant to a fellow juror. The fact that Mrs. Brown conveyed her impression to another juror is especially damaging, because it served to reinforce the views Mrs. Warren was already formulating at

that stage of the trial. That is to say, Mrs. Warren, upon hearing Mrs. Brown's remark, was put on notice that another juror shared her opinion on the crucial question of the defendant's credibility. In light of the foregoing misconduct on the part of one of the jurors and the serious prejudicial effects emanating therefrom, it must be concluded that the defendant did not receive a trial by a fair and impartial jury. Therefore, his conviction must be set aside and a new trial granted.

It is well settled under Federal law that jurors are not entitled to discuss their case among themselves prior to the trial court's submission of the case to the jury for final deliberations. This principle was set forth in *Winebrenner v. United States*, 147 F. 2d 322 (8th Cir. 1945), which held that it is reversible error for a trial judge to instruct the jurors that they may discuss the case among themselves during the course of the trial as long as they keep an open mind on the issues being tried. *Winebrenner* involved a prosecution for conspiring to use improper influence to have Government contracts awarded to a company in which the defendant had an interest. Because the opinion in *Winebrenner* constitutes an excellent discussion of the dangers stemming from pre-instruction discussion by the jurors, it is beneficial to our analysis to look at the opinion with some degree of scrutiny.

In reaching its decision in *Winebrenner*, the Court relied primarily on the fundamental proposition that the jury's open minded consideration of all the evidence can be assured only by prohibiting the jurors from considering and discussing any evidence until such time as all the evidence has been presented, the attorneys for both sides have been afforded the opportunity to present their final arguments, and the Court has given the jury its final instructions. Thus, the Court stated at 147 F.2d 328:

> "If, however, the jurors may discuss the case among themselves, either in groups of less than the entire jury,
>
> "or with the entire jury, they are giving premature consideration to the evidence. By due process of law is meant

'a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel."

The Court in *Winebrenner* also emphasized the fact that a juror who expresses prior to the authorized time for deliberation an opinion about the case is likely to consider any remaining evidence and the closing arguments with a view toward strengthening his previously formed opinion. The Court reasoned as follows at 147 F.2d 328:

"A juror having in discussion not only formed but expressed his view as to the guilt or innocence of the defendant, his inclination thereafter would be to give special attention to such testimony as to his mind strengthened, confirmed or vindicated the views which he had already expressed to his fellow jurors, whereas, had there been no discussion and no expression of tentative opinion, he would not be confronted with embarrassment before his fellow jurors should he change the tentative opinion which he might entertain from hearing evidence."

Applying this reasoning to the instant case, we must infer from the face of her conduct that Mrs. Brown, once she had remarked to her fellow juror that she believed that the defendant had lied on two occasions, was at that time no longer capable of giving fair and impartial consideration to the defendant's side of the case.

It is very important to note that in *Winebrenner* the Court was concerned with the *potential* for prejudice inherent in allowing members of the jury to discuss the case prior to the time they were to begin their deliberations. In short, the Court was

fearful that such pre-instruction deliberation would undermine the impartiality and fairness to which the defendant had an absolute constitutional right. In the instant case, we can see that the *Winebrenner* Court's fears, so eloquently set forth in the Court's opinion, were actually realized, because one juror did, in fact, begin to prejudge the case prior to the time the jury was to begin its deliberations and, more importantly, she sought to convey her impressions to another member of the jury.

Throughout its opinion, the paramount concern of the *Winebrenner* Court was with the protection of the integrity of the jury system. This same concern is of likewise paramount importance to this Court, or else it would not have authorized the attorneys in the instant case to make the inquiry which has given rise to this motion. In order to give effect and full vitality to the policy considerations set forth in *Winebrenner*, this Court must set aside the defendant's conviction and grant a new trial.

II

During the course of the trial the United States Attorney elicited, over the objection of defense counsel, testimony to the effect that the defendant owned a five bedroom home with a swimming pool, that he lived in a fashionable neighborhood, that his children went to private schools and, in general, that he had become financially successful in a relatively short period of time. During his closing argument, the United States Attorney compounded the prejudicial effect created by the introduction of the aforesaid evidence by making a highly inflammatory argument to the effect that the defendant, despite having been forced to give up his previously successful occupation as a bond salesman, is still able to maintain a high standard of living and further to the effect that the defendant is a slick operator "who is likely to rob you on Saturday night and meet you in church on Sunday morning."

The United States Attorney's actions in bringing to the jury's attention evidence pertaining to the defendant's financial status was calculated to induce the jury to infer from the defendant's financial status that he was a man of no scruples and questionable character—in short, a man who would stop at nothing to attain financial success. That the introduction of this evidence was designed to have this effect cannot be doubted in view of the United States Attorney's vitriolic and prejudicial closing argument. Moreover, the accompanying affidavit of Mrs. Myrtle Lemmon shows that this calculation had its intended effect. As Mrs. Lemmon's affidavit shows, some jurors did infer from the defendant's financial status that he was the type person who would engage in criminal activity to enrich himself financially and some jurors did, in fact, infer that the defendant had probably committed income tax evasion.

The only evidence which should have been presented to the jury in the instant case was that evidence which tended to prove or disprove the charges in the indictment. Evidence that the defendant had a five bedroom house with a swimming pool and that he lived in a fashionable neighborhood had absolutely nothing to do with whether the defendant was guilty of defrauding South Central Bell Telephone Company, and, for that reason, this evidence should have been excluded. Moreover, even assuming that such evidence did contain some probative value, its prejudicial effect on the jury—subsequently compounded by the United States Attorney's closing argument—dictated that it be excluded from evidence.

Appellate Courts have time and time again reversed convictions following trials in which there was introduced evidence having the effect of inducing the jury to judge the defendant's character harshly. These rulings mark a recognition of the fact that

> "verdicts in closely contested criminal cases often find their real spring in the atmosphere generated in and by the trial where things felt but unseen, sometimes real, sometimes illusory, arising out of, but more than, the relevant and admissible evidence, in the end more influence the verdict than does the relevant testimony itself." *Scott v. United States*, 263 F.2d 398, 401 (5th Cir. 1959).

A brief look at some of these authorities will serve to illustrate the proposition asserted herein.

Blumberg v. United States, 222 F.2d 496 (5th Cir. 1955) involved a prosecution for income tax evasion based on the theory that specifically accounted for income was not reported as income. The Court of Appeals for the Fifth Circuit held that it was error for the trial court to allow the introduction of evidence that the defendant's wife took a large sum of cash to New York City and that the defendant spent a huge sum of money on his daughter's wedding. The Court reasoned that the jury could have believed that, despite the Government's failure to prove that these sums of money constituted unreported income, the sums were nevertheless hidden and unreported money.

Hartman v. United States, 215 F.2d 386 (8th Cir. 1954), was a prosecution for income tax evasion allegedly occurring when the defendant transferred funds from his wholly owned corporation to his own private account without reporting such funds as taxable income. The Court held that it was error for the trial court to introduce evidence, unrelated to the charges embraced in the indictment, designed to show that the defendant had cheated on his expense accounts.

In *Lansdown v. United States*, 348 F.2d 405 (5th Cir. 1965), a prosecution for interstate transportation of a firearm, the defendant's conviction was reversed because the trial court allowed testimony to the effect that the defendant had earlier stated his intent to burglarize a local restaurant and to the effect that he possessed so called "burglary tools" at the time of his arrest.

South v. United States, 368 F.2d 202 (5th Cir. 1966), involved a prosecution for using the mails to promote illegal gambling activity. The Court held that it was error for the trial court to admit into evidence certain of the defendant's past income tax returns when they did not tend to prove the charges embraced within the indictment. The Court reasoned that their probable effect was to cause the jury to believe that the defendant had committed income tax evasion in the past.

Because the above described evidence pertaining to the defendant's financial status was irrelevant to the issues tried in the case and because the introduction of this evidence had a prejudicial effect on the jury deciding those issues, the verdict should be set aside and a new trial granted.

For the reasons set forth in this Memorandum, we respectfully submit that the defendant must be granted a new trial.

Respectfully submitted,

Burch, Porter & Johnson
/s/ Lucius E. Burch, Jr.
J. Brooke Lathram
Attorneys for Defendant

Certificate of Service

I hereby certify that a copy of the foregoing has been sent to Larry Parrish, this .... day of ....., 1974.

.....

APPENDIX G

In the United States District Court for the
Western District of Tennessee
Western Division

United States of America
vs.
Larry Owen Manning
} No. CR 72 171

AFFIDAVIT OF MRS. WILLIAM PAUL WARREN

(Filed June 7, 1974)

Comes now the Affiant, Mrs. William Paul Warren, and states under oath as follows:

1. I served as a juror in the recent trial of the above captioned case.

2. While walking out of the courtroom during a recess which occurred in the middle of Mr. Manning's testimony, another juror, Mrs. Mary Brooks Brown, remarked to me that she believed that Mr. Manning, during that portion of his testimony which had just theretofore been completed, had failed to tell the truth on two occasions. Though I was then in agreement with her (and therefore was not influenced by her remark), I made no response whatsoever to Mrs. Brown, and I did not relate this incident to anyone during the remainder of the trial. Furthermore, I made no comments about the case to any other jurors prior to the time the jury was instructed to begin

their deliberations, and I made no comments about the case to any non-jurors during the entire course of the trial.

Further Affiant sayeth not.

s Mrs. William Paul Warren
Mrs. William Paul Warren

Sworn to and subscribed before me a Notary Public, this 5 day of June, 1974.

Judy La Forge

My Commission Expires July 14, 1974.

(Seal)

Certificate of Service

I hereby certify that a copy of the foregoing has been sent to Larry Parrish, Federal Building, Memphis, Tennessee, this 7th day of June, 1974.

J. Brooke Lathram

APPENDIX H

In the United States District Court for the
Western District of Tennessee
Western Division

United States of America v. Larry Owen Manning	CR No. 72-173

RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

(Filed June 25, 1974)

On June 7, 1974, defendant filed a Motion for New Trial with a Memorandum in Support thereof. By this Motion and the supporting Memorandum, the defendant alleges two grounds for the relief which he seeks. First, he alleges that there was in fact misconduct on the part of a juror which violated the right of the defendant to an impartial jury. Second, defendant alleges that certain proof was admitted concerning his financial circumstances which was the subject of legally sufficient objection by defendant.

The first ground for the defendant's Motion for New Trial is based on an allegation that during a recess in the proceedings which interrupted the testimony of the defendant, one juror, Mrs. Brown, commented to another juror, Mrs. Warren, as the two were leaving the courtroom, that up to that point in the defendant's testimony he had given false testimony on two points.

This allegation is based on an affidavit subscribed by Mrs. Warren. Though permission was granted defense counsel to interview each of the jurors, there is no affidavit from Mrs. Brown supporting the fact of this occurrence. Further, the affidavit of Mrs. Warren affirms that she made no response whatever of any kind to the comment by Mrs. Brown. She states, in addition, that she did not comment to any other juror on this subject, until deliberations had begun, or the fact that Mrs. Brown had commented to her at any time. Finally, and importantly, Mrs. Warren states that this occurrence had absolutely no effect on either the verdict she rendered or her participation in the deliberation with other jurors.

The defendant rests the authority for the relief which he seeks based on the above-described conduct on what he describes as a strong presumption of prejudice which is categorized as impossible for the government to overcome. This presumption supposedly is the product of the language in *United States v. Ferguson*, 486 F.2d 968 (6th Cir., 1970). To draw any specific analogies from that case to the instant simply cannot be done. In *Ferguson*, jurors were contacted by persons not members of the same jury. That factor creates a vast chasm between the facts there controlling and the facts and circumstances of the instant case. However, *Ferguson* does stand for the general proposition that the relevant inquiry is whether there exists, by reason of what has occurred, any prejudicial effect on a substantial right of the defendant.

In the Memorandum in Support of the Motion for New Trial, the defendant seems content to rely on the "strong presumption" on the issue of prejudice and skips on to a consideration of the holding in *Winebrenner v. United States*, 147 F.2d 322 (8th Cir., 1945). In *Winebrenner*, the Court of Appeals had before it a fact situation where the district judge affirmatively advised the jurors that throughout the course of the trial, they could feel free to discuss the case among themselves so long as they held an open mind on the issue of guilt or innocence. This

factual situation hardly bears a resemblance to the circumstances in the instant case. But in that context, the appellate court took occasion afforded by those facts, in explanation of its holding that prejudice was apparent, to explain the importance of withholding jury deliberation until the conclusion of proof and jury instructions. The defendant lifts from that context certain quotations which seem appropriate observations as to why the practice being denounced should not be allowed.

Though diligent search has been made, no case can be found which presents a sufficiently analogous factual setting to qualify as authority on the specific point here in question. However, without some specific authority to the contrary, the burden always lies with the party claiming prejudice to establish it in order to even seek relief of any type based on such a bald allegation. It must be recognized that a jury is made up of human beings who have normal minds and who are unable to reject initial impressions made by sensory perceptions. Though jurors are expected to perceive without forming a final conclusion until a specified time, they are not required to withhold normal initial reactions to what they perceive. The impossible is not required and mechanical devices. Thus, the repeated and oft cited observation that "perfect" justice is an unattainable standard and substantial justice is the most the law requires. If, in fact, Mrs. Brown did make the comment attributed to her, there is not the slightest indication that she was not a fair, unbiased and impartial juror who reached her ultimate verdict by the process of deliberation with other jurors after full consideration of the totality of the proof fairly considered. That she may have verbalized her initial reaction in the manner alleged, though perhaps unfortunate, bore no significance whatever as it concerns the fairness of the jury's verdict. This is verified by the affidavit of the juror to whom the unresponded-to comment allegedly was made. Therefore, no prejudice having been shown, to set aside the jury's verdict and require a third trial is not in order.

The second allegation which forms the basis of the Motion for New Trial concerns the introduction of evidence concerning the financial status of the defendant. This really presents a question of materiality and relevancy more than anything else. However, the timeliness and type of formal objections to the introduction of the evidence into the proof also becomes salient. Because there is a large element of discretion involved in the admissibility of the evidence in question, care must be taken to adopt that perspective which the court had in exercising its discretion which prevailed when the issue presented itself at trial. It is submitted that the defendant attempts to approach this problem by a more or less back-door and hind sight point of view by the submission of an affidavit from a juror, Mrs. Lemmon, who purports to categorize some events which occurred in the jury room during the deliberation process as jurors considering "factors which were totally irrelevant to the issues tried in the case and highly prejudicial to the defendant." After that observations in her affidavit, Mrs. Lemmon seeks to catalog certain types of evidence related to the financial status and personal possessions of the defendant which, according to her, were important to some jurors in reaching their conclusion of guilt. From this, the defendant seeks to argue backwards that some of the evidence referred to was obviously prejudicial. Aside from the fact that the interrogation of Mrs. Lemmon which led to the information contained in her affidavit necessarily was outside the authorization granted counsel to inquire of jurors for the limited purpose of determining whether or not issues in this case were discussed by members of the jury among themselves prior to the submission of the case to the jury for deliberation, assuming the truth of the allegations by Mrs. Lemmon, the context of the remarks referred to and the significance, if any, attached to those facts appears nowhere of record. However, to now seek to assess the exercise of the court's discretion in allowing the evidence from such a hindsight point of view is improper.

In order to appraise the admissibility of the evidence in question, it is essential to view it in the context of the entire proceedings as the issues developed and crystallized as the trial progressed. To do this encompasses a review of the entire trial proceeding. Since there is no trial transscript prepared at this time, the writer will rely on memory for this purpose.

In the first place, from the very opening statement, the defense sought to create in the minds of the jury the impression that the defendant was a hard-working young man who started with nothing and pulled himself up to a place of success by industriousness, diligence and devotion. Further, the defense injected the thought, the result of all of this studious effort had been wrecked and his career stymied if not ruined by an unfair arrest and prosecution. On the other hand, the government was under the burden of showing that the defendant's conduct was part and parcel of an illegal scheme and device designed for the purpose of defrauding its victim, the telephone company. Whereas the defense sought to cast the offense as being no more than a single and isolated usage of the blue box for no purpose other than a legitimate and enterprising interest in developing a marketable device for general non-fraudulent use, the government endeavored to prove that the conduct evidenced a means towards the end of marketing on a wide scale a device, the sole purpose of which was to defraud the telephone company by pirating use of their facilities without cost to the user. The blue boxes were shown to be expensive items of value only to those who had a need for extensive use of long distance telephone service and who were prone toward fraud themselves. Finally, even the defense in pursuit of its trial strategy sought to establish that the defendant was a man of means who had no motive to defraud the telephone company out of a small sum of money by his isolated use of the blue box.

One other aspect of the trial proceedings which is of significance revolves around the fact that the government at-

tempted (and tendered proof to establish) to show that on the day of the defendant's arrest, he possessed and was using some eight telephones in his own home for which he had not paid the telephone company. It was contended that this conduct was demonstrative of a general intent by the defendant to defraud the company alleged in the indictment to be the victim of the scheme charged. At the time of the defendant's testimony, the court had reserved ruling on the admissibility of that proof awaiting the conclusion of the case in chief of defendant in order to determine its relevancy. Although the court ultimately determined the proof to be inadmissible, primarily based on the inconclusiveness of the record concerning the entitlement of the telephone company to money as a result of the use by defendant of the eight telephones, the government, by cross-examination, sought to lay a foundation for that proof if determined that the evidence thereof was admissible.

The parent point of defendant's Motion for New Trial based on this ground seems to be that anything that tended to interfere with the characterization of the defendant which he sought to portray of well-to-do, but frugal, hard-working and honest, man was immaterial. In other words, defense sought to have its cake and eat it, too. Therefore, an obvious dilemma was created in the minds of defense in precisely when and what to object to as the proof came in on this topic. The result was that objections were often not timely and very unspecific. For instance, objections were forthcoming when a question was asked of the defendant as to whether or not he owned a swimming pool as a part of his residence. However, the preceding question as to the number of bedrooms, and other rooms, in his house did not elecit an objection. Further, an objection was made when the question was asked of the defendant as to whether he had children and where they attended school. Also, this objection was accompanied by a statement of defense counsel, in the presence of the jury, that the question was nothing more than an attempt to prejudice the jurors by

showing that his children attended exclusive private schools. Up to that point there was not a word anywhere in the record as to the nature or type of schools mentioned. Evidence concerning the defendant's present occupation as the owner of certain food markets was totally 100% the product of evidence offered and elicited by the defendant. At least on one occasion the writer remembers an objection being made to "this whole line of testimony" which is hardly susceptible of specific treatment by the court.

It is axiomatic that areas of inquiry which may in and of themselves be subject to some doubt become unquestionably areas subject to inquiry because the subject is opened up by cross-examination or other trial tactics or strategy. *United States v. Jackson*, 344 F.2d 922, 923 (6th Cir., 1965), cert. den. 382 U.S. 880. Where evidence is offered for the purpose of proving a man's character as circumstantial evidence attaching significance to his conduct in order to resolve the ultimate issue of his state of mind in engaging in the conduct in question, it is admissible. In this context the character is revealed by specific conduct. *McCormack On Evidence*, §153, §154 (1954 Ed.). Of course, certain evidence such as the type of automobile driven by the defendant and his place of residence had evidentiary significance in connection with the various surveillances conducted in connection with the defendant. That the residence was located in a "fashionable" neighborhood was never evidenced by any proof.

In order to determine whether or not tendered evidence is either material or relevant requires an analysis based on the issues and contentions. This includes, in addition to the ultimate issue, those issues which are raised by unobjected to evidence bearing directly on subsidiary issues. If evidence bears a probative relationship to a legitimate issue, then it is material. Further, if evidence has a logical tendency to establish a proposition which has a probative relationship to the issue, it is rele-

vant. In the context of the entire proceeding, the trial judge is called upon to exercise his wise discretion in evaluating whether or not particularly offered evidence meets these prerequisites. If such evidence does meet these prerequisites and is competent, then its admission is subject to appellate review only if there has been an abuse of that discretion in such a way as to cause obvious prejudice (not to be confused with incrimination) to a defendant so as to deny him substantial justice by a fair trial. Here, all of the evidence being questioned meets all of the tests required by law.

Appellate courts have repeatedly held that evidence of financial circumstances of a defendant is admissible to show motive, propensity and/or ability to commit acts which bear on the ultimate issue in contest. Further, whether or not such evidence should be admitted in the context of a particular trial addresses the discretion of the court. *United States v. Kwiket*, 467 F.2d 1222, 1225 (7th Cir., 1972), cert. den. 409 U.S. 1079; *United States v. Houlihan*, 332 F.2d 8, 14-15 (2nd Cir., 1964). See generally *II Wigmore, Evidence*, §382, §385, et. seq. (3rd Ed. 1940). Further, where evidence is offered to establish a foundational basis for other evidence, and is admissible for this purpose, if for some reason the evidence for which the foundation is laid is not admitted, absent a specific motion to strike based on the ground that the evidence has no materiality except as a foundation and is therefore inadmissible, the fact that such evidence was not stricken is not error. *Skiskowski v. United States*, 158 F.2d 177, 181-182 (D.C.Cir., 1946), cert. den. 330 U.S. 322. Further, general objections to the admissibility of evidence which lack a reasonable degree of specificity are insufficient in law to preserve a right to later complain because of the admission of certain specific evidence. *United States v. Bryant*, 480 F.2d 785, 792 (2nd Cir. 1973); *United States v. Wright*, 466 F.2d 1256, 1259 (2nd Cir., 1972). Further, it is fundamental that a general objection to the admissibility of evidence will not serve as sufficient to exclude

evidence if the evidence objected to is admissible for any purpose under any theory of law. *United States v. White*, 377 F. 2d 908, 909 (5th Cir., 1967).

Finally, in the Memorandum of Points and Authorities in Support of the Motion for New Trial of defendant, there is an attempt to urge the court that the evidence complained of must be considered in combination with what is characterized as the "vitriolic and prejudicial" closing argument of the government. The fact that defendant would even suggest such an approach tends to admit the weakness and insubstantiality of the primary contention that certain evidence was admitted to the prejudice, as opposed to the mere incrimination of, the defendant. In other words, this amounts to a confession that the primary argument cannot stand alone. However, as will be shown, the attacks directed at the final argument of the government are in and of themselves frivolous. A very enlightened and thorough discussion of the standards which must be met by a prosecutor's final argument appears in *United States v. Cook*, 432 F.2d 1093, 1106-1108 (7th Cir., 1970).

In the *Cook* case the Court of Appeals was faced with a situation where the prosecutor had referred to the defendant as a "sub-human man" with a "rancid, rotten mind" and a "true monster." There was a further allegation that certain remarks of the Assistant United States Attorney in that case amounted to a suggestion to the jury that the defendant was of such a character that he did not deserve a trial and under most judicial systems would not have been afforded one. As to the latter allegation, after quoting the remarks of the Assistant United States Attorney on that subject, the Court of Appeals found that the conclusion suggested by the defendant as to the import of those remarks was not necessarily warranted. Considering this factual situation, the Court of Appeals did not reverse the conviction or even suggest that the remarks were out of line. It is here appropriate to quote from the opinion in the *Cook* case to show the sound reasoning applied in reach-

ing its conclusion. The court quotes from another case as follows at p. 1108:

> The case is more nearly analogous to that of McManaman v. United States, 327 F.2d 21, at page 24 (10th Cir. 1964), where the court stated the following:
>
> 'The remarks of government counsel in closing argument which are said to be prejudicial were: "* * * We are not dealing with any amateurs." "I opened by closing statement by saying we are not dealing with ordinary violators." These remarks were not of a character as to deprive the defendants of a fair trial and were not unwarranted by the record. "The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial.' "

The court further remarked at pp. 1106-1107:

> We do not find any reversible error here. The district attorney is quite as free to comment legitimately and speak fully, although harshly, upon the action and conduct of the accused, if the evidence supports his comments, as is the accused's counsel to comment upon the nature of the evidence and the character of the witnesses which the government produces and which is favorable to him.

The court further observed at p. 1107:

> Further, objections were not lodged to all of the remarks challenged on this appeal. In some instances, if a prosecuting attorney's remarks were continuously of an inflammatory nature with an appeal to prejudice or similar improper motives, the court might well have the duty *sua sponte* to correct the situation. Here, however, it is to be noted that when the words are placed in their context the closing arguments of the prosecution staff did not constitute an inflammatory type of appeal. The government's

> closing argument and rebuttal span sixty-five pages of the transcript and took an hour and a half to deliver. Yet only a few epithets uttered in the midst of an otherwise perfectly proper argument were involved. Substantially all of the argument, as it should have been, was an analysis of the evidence and the prosecutor's remarks were not 'pronounced and persistent' as contended by Cook.

Finally, the court observed at p. 1107:

> As in the *Ramos* case, the government attorney in the case before us told the jury at the beginning and end of his closing argument that his remarks were not evidence, which warning was repeated by counsel for Cook. In his charge to the jury, the judge also instructed the jurors that arguments of counsel were not in evidence, and that they were to rely solely on the evidence presented without prejudice.

Though the writer does not have available a transcript of the government's final argument, the personal recollection is to the effect that the portion of the final argument which is the subject of complaint by defendant was in the context of a general description of persons with tendancies toward fraud. The jury was then encouraged to review the evidence of the conduct and character of the defendant and note the similarities in character. The writer has no specific recollection of ever particularly identifying defendant as a person who had engaged in such conduct as robbery on Saturday night or attendance at church on Sunday morning. It was merely in the context describing that as illustrative of the type of mentality which accompanies a person with fraudulent intentions. It is difficult at this point without transcript to recall the details of the final argument but to conclude that the entire argument made in context and in light of all of the proof was certainly not designed to deprive the defendant of a fair trial nor was this their effect.

In light of all of the above circumstances and the prevailing and controlling law, the government respectfully moves the court to overrule and dismiss the defendant's Motion for New Trial.

Respectfully submitted,

THOMAS F. TURLEY, JR.
United States Attorney

s By LARRY E. PARRISH
Assistant United States Attorney

Certificate of Service

I, Larry E. Parrish, Assistant United States Attorney for the Western District of Tennessee, do hereby certify that I served a true copy of the foregoing Response to Defendant's Motion for New Trial on Lucius E. Burch, Jr., Esq., Attorney for Defendent, by mailing the same to his office address, 130 North Court, Memphis, Tennessee 38103 on this 25th day of June 1974.

s LARRY E. PARRISH
Assistant United States Attorney

APPENDIX I

In the United States District Court for the
Western District of Tennessee
Western Division

United States of America
vs.
Larry Owen Manning
} No. CR 72-173

DEFENDANT'S SECOND MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

(Filed June 27, 1974)

This Memorandum is offered in reply to that portion of the Government's "Response to Defendant's Motion for New Trial" which deals with the Government's contentions made with respect to the question of juror misconduct.

The Government's attempt to distinguish *United States v. Ferguson*, 486 F.2d 968 (6th Cir. 1970), is without merit. It is true that *Ferguson* dealt in part with an improper communication made by a third person to a member of the jury. However, the Sixth Circuit, in holding that an improper communication to a juror gives rise to a presumption that the rights of the defendant are prejudiced, certainly did not limit its holding to situations involving communications made by or to third persons. This is indicated by the fact that in *Ferguson* the Court was not concerned with the impact of the third person's comment on the juror to whom the comment was made. In fact, that particular juror was removed from the jury panel prior to the submission

of the case to the jury for final deliberations. Instead, the Court in *Ferguson* was concerned with the potentially prejudicial effect of the comment made to another juror, who did remain on the panel, by the juror to whom the third party's communication had previously been made. It was because of the prejudicial effect of this intra-jury communication that the Court reversed the case and remanded it for a new trial.

Additionally, it should be noted that in *Ferguson* the Court recognized its paramount objective to be "not only to insure that the defendant received a fair trial by impartial jurors, but also to maintain the integrity of the jury system." 486 F.2d at 971. Commitment to that objective necessitates that we not limit the presumption of prejudice to improper communications made to jurors by third persons. Instead, it demands that we extend the presumption to communications by one juror to another made in flagrant violation of the Court's order prohibiting pre-final instruction discussion of the case.

The Government also attempts to belittle the defendant's reliance on *Winebrenner v. United States*, 147 F.2d 322 (8th Cir. 1945), by pointing out, just as did the defendant's first memorandum in support of this motion, that *Winebrenner* dealt with the impropriety of the trial judge's instructing the jurors that they were free to discuss the case throughout the course of the trial. What the Government's memorandum fails to recognize is *Winebrenner's* excellent discussion of the dangers of premature discussion of the case by jurors. For the reasons pointed out in the defendant's first memorandum, the sound reasoning of the *Winebrenner* case constitutes good authority for setting aside the guilty verdict rendered in this case.

Finally, the Government argues that the defendant has not shown that he was prejudiced by the misconduct occurring in the instant case. In response to this contention we simply note that the defendant does not have the burden of showing that he

has been prejudiced. As already demonstrated, the defendant's rights are presumed to have been prejudiced and the burden is on the Government to overcome that presumption. Nevertheless, as pointed out in the defendant's first memorandum, the affidavit of Mrs. Warren does indeed conclusively demonstrate that the defendant's right to a fair trial has been prejudiced in the instant case. First, it shows that Mrs. Brown, prior to the submission of the case to the jury, had become predisposed to judge the defendant harshly—a predisposition which undoubtedly became stronger after she conveyed her impressions to a fellow juror. See *Winebrenner*, 147 F.2d at 328. Second, the affidavit shows that Mrs. Brown's remark served to re-enforce Mrs. Warren's feelings about the defendant's credibility.

The Government places much importance on Mrs. Warren's statement that she was not influenced by Mrs. Brown's remark. However, the Government ignores the reason why Mrs. Warren states she was not prejudiced—i.e., because she already agreed with Mrs. Brown that the defendant had been lying on the stand. In view of the fact that Mrs. Warren admits that at the time in question she shared Mrs. Brown's view of the evidence, it cannot seriously be maintained that Mrs. Warren, whose sincerity we do not doubt, was thereafter genuinely able to accord the defendant that degree of impartiality and fairness which the Constitution requires. Instead, as noted above, the affidavit shows conclusively that Mrs. Brown's improper comment came at a time when its effect could only have been to strengthen the negative views of the defendant already held by Mrs. Warren.

That jurors are human beings prone to making mistakes, as the Government states in its memorandum, cannot of course be disputed. However, where, as in the instant case, a juror acts, to the serious detriment of the accused, in violation of the express instructions of the Court, the elementary proposition that "jurors are human beings who make mistakes" cannot be parlayed into a justification for allowing a man to be tried and

convicted unfairly. To allow otherwise would both undermine the integrity of the jury system and render meaningless the Court's instructions which the jurors swear on their oath to obey.

For the foregoing reasons, the defendant respectfully submits that the guilty verdict should be set aside and a new trial granted.

BURCH, PORTER & JOHNSON
By LUCIUS E. BURCH, JR.
J. BROOKE LATHRAM
Attorneys for Defendant

Certificate of Service

I hereby certify that a copy of the foregoing has been sent to Larry Parrish, Federal Building, Memphis, Tennessee this 27th day of June, 1974.

/s/ J. BROOKE LATHRAM